

**FINAL**

**SAFETY AND HEALTH CODES BOARD  
MEETING MINUTES  
THURSDAY, JANUARY 14, 2010**

**BOARD MEMBERS PRESENT:** Mr. Roger Burkhart, Vice Chair  
Dr. Diane Helentjaris, VDH representative  
Mr. M. Frank Hartsoe, Chair  
Mr. Daryl Hines  
Dr. James Mundy  
Mr. Mike Murphy, DEQ representative  
Ms. Eloisa Rea  
Ms. Milly Rodriguez  
Mr. Chuck Stiff  
Mr. Danny Sutton

**BOARD MEMBERS ABSENT:** Mr. Louis Cernak  
Ms. Anna Jolly  
Mr. Satish Korpe  
Mr. Linwood Saunders

**STAFF PRESENT:** Mr. Ray Davenport, Commissioner, Dept. of Labor and  
Industry  
Mr. Bill Burge, Assistant Commissioner – Programs  
Mr. Glenn Cox, Director of VOSH Programs  
Mr. Jay Withrow, Director, Division of Legal Support  
Mr. Ron Graham, Director, Occupational Health  
Compliance  
Mr. Ed Hilton, Director, Boiler Safety Program  
Mr. John Crisanti, Manager, Office of Planning and  
Evaluation  
Ms. Reba O'Connor, Regulatory Coordinator  
Ms. Jennifer Wester, Director, Cooperative Programs  
Division  
Ms. Ashley Mitchell, Staff Attorney  
Ms. Regina Cobb, Agency Management Analyst Senior

**OTHERS PRESENT:** Ms. Beverly Crandell, Federal OSHA  
Ms. Anne Burkhart  
Ms. Diane Paarfus, CCR, Chandler & Halasz, Inc.

**ORDERING OF AGENDA**

Mr. Frank Hartsoe, Board Chair, called the meeting to order at 10:00 a.m. Mr. Hartsoe then asked for a motion from the Board to approve the Agenda. On proper motion by Mr. Sutton and

second by Ms. Rodriguez, the Revised Agenda was approved, as submitted. The motion was carried by unanimous voice vote.

## **APPROVAL OF MINUTES**

Mr. Hartsoe asked the Board for a motion to approve the Minutes for the August 13, 2009, Public Hearing and for the Board Meeting. On proper motion by Mr. Sutton and seconded by Mr. Stiff both Minutes were approved, as submitted, by unanimous voice vote.

## **PUBLIC COMMENTS**

Mr. Hartsoe opened the floor to comments from the public, however, there were no comments.

## **OLD BUSINESS**

### ***16 VAC 25-50, Final Regulatory Action to Amend Boiler and Pressure Vessel Rules and Regulations***

Mr. Ed Hilton, Director, Boiler Safety Programs for the Department of Labor and Industry, requested the Board to consider for adoption the final regulatory action to amend 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations.

Mr. Hilton then reviewed the list of 12 final amendments. During this review, Mr. Hilton called the Board's attention to two new revisions since the proposed regulatory stage: #8 Incorporation by reference of the most recent edition "(2007) of B31.1, ASME Code for Power Piping, American National Standards Institute," which replaced the "2006 edition of B31.1, ASME Code for Pressure Piping, American National Institute"; and #10, Incorporation by reference of the most recent edition "(2009) of CSD-1, Controls and Safety Devices for Automatically Fired Boilers" which replaced the "2006 edition of CSD-1, Controls and Safety Devices for Automatically fired Boilers". He explained that the language "and related section on maintenance that includes revised inspector's checklist" was deleted by the Department until ASME decides where it wants to place the language, in the maintenance section or in the Appendix.

Mr. Hilton stated that this amendment is authorized by Title 40.1-51.6.A of the *Code of Virginia*. He informed the Board that the purpose of the final regulatory action is to conform to the most current editions of ASME and National Board safety and inspection codes, as well as in-house administrative fee adjustments to cover increased costs of doing business.

He then summarized the rulemaking process by explaining that a NOIRA was adopted by the Board on February 28, 2008, and was published on June 9, 2008, with a 30-day comment period ending on July 9, 2008. He stated that three comments were received. He added that the Board adopted proposed regulatory language on November 20, 2008, which was published on July 20, 2009, with a 60-day comment period ending on September 18, 2009. He stated that there were two comments received. He informed the Board that a public hearing was held on August 13, 2009, but there were no comments.

With respect to impact of the amendments on employers, employees and the Department, Mr. Hilton explained that the increase in fees will affect a number of the approximately 50 “R” Stamp holders in the Commonwealth that have their reviews performed by the Department. He stated that during calendar years 2006 and 2007, the Department performed 15 and 14 such inspections, respectively. Mr. Hilton stated that the increased cost to these employers who request a review is \$200 once in a three-year period, and that review to \$1,000. He added that the last time the review fee was increased to address the additional costs of doing business was in the 1999 Edition of the Boiler Rules and Regulations. He informed the Board that the only other alternative for employers would be to have the review performed by the National Board which charges \$3000 for the review.

Lastly, Mr. Hilton explained that the non-fee related changes are necessary to update the regulations to the current editions of ASME and national Board safety and inspection Codes which are incorporated by reference.

Mr. Hilton concluded by recommending, on behalf of the Boiler Safety Compliance Program, that the Board adopt the final amendments to 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulation as a final regulation of the Board, as authorized by §40.1-51.6.

The motion to adopt the final Amendments to 16 VAC 25-50, Boiler and Pressure Vessel Rules and Regulations was properly made by Mr. Burkhardt, seconded by Dr. Mundy and unanimously carried by voice vote.

***16 VAC 25-60, Revised Proposed Regulation to Amend 16 VAC 25-60, Administrative Regulation for the Virginia Occupational Safety and Health (VOSH) Program, 16 VAC 25-60-240 and 16 VAC 25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths***

Mr. Jay Withrow, Director of the Office of Legal Support for the Department of Labor and Industry, requested the Board to consider for adoption the revised proposed regulation to amend 16 VAC 25-60-240 and 16 VAC 25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths.

In summarizing the rulemaking process, Mr. Withrow explained that the Board adopted final regulatory language on August 13, 2009, and that the final regulation was submitted to the Department of Planning and Budget (DPB) for Executive Branch review on September 11, 2009. He further explained that although DPB’s policy memo is considered to be Governor’s Confidential Working Papers, Department staff were informed that DPB had recommended the final regulation “with reservations.” He stated that DPB’s reservations involved the change to 16 VAC 25-60-90.B, concerning a witness’ ability to obtain a copy of their interview statement, and was based on the following factors:

- It is a significant change with the potential to impact numerous employees;
- This change is being added at the final stage without the opportunity for extensive analysis and public comment; and
- It is unclear whether a change to a substantive right exceeds the scope of the NOIRA.

He explained that DPB had suggested to Department staff that the Board either: (1) consider withdrawing the package and submitting it as a revised proposed regulation, or (2) remove the change to §90.B. and submit it later as a separate action.

Mr. Withrow informed the Board that the Department staff recommends pursuing option (1) by re-submitting the regulation as a revised proposed regulation and requesting the Board's approval to publish it subject to a comment period of at least 30 days, pursuant to Va. Code §2.2-4007.03, which provides:

“If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation, provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section.”

Mr. Withrow explained that pursuing option (1) above would allow the Department to make a change to the provision that will hopefully address the concerns expressed by DPB, and then later by the Secretary's Office. He added that the regulation went to the Secretary's Office level, but they saw the DPB reservation so they wanted the Department to take care of DPB's reservation. Mr. Withrow explained that following option (1) allows the Department to publish the revised proposed regulation, give a 30-day comment period, which addresses DPB's concern about time for analysis and comment, and then the Department would come back to the Board with the final regulation again, the Board would have the opportunity to adopt it, and then the Department would go back to DPB again and through the Secretary's office and then to the Governor's office.

Mr. Withrow stated that the Department staff also recommended changing the language in the interview statement section to read as follows:

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement] in accordance with the provisions of §40.1-11 of the Code of Virginia].

Mr. Withrow reminded the Board of the reason for the language that the Department is requesting. He explained that the issue arises when employees are interviewed, particularly, when there is an accident investigation, fatal accident investigation. He stated that in at least a couple of cases recently, attorneys for employers have independently identified the people interviewed, contacted those employee and asked them and/or instructed them to request a copy of their interview statement and to turn that statement over to the attorney. He continued by stating that this practice is allowed under the old language and that the practice could compromise an employee's willingness in future investigations to provide any truthful and full and fair interview statement of what actually happened. He noted that this could have a potential chilling effect, and runs contrary to the legal principals in the Department's Labor Laws in §40.1-49.8(2) which provides that inspectors are permitted to “question privately any such employer, owner, operator, agent or employee”. Mr. Withrow added that the proposed language will retain the basic right of a witness to obtain a copy of his/her interview statement but it will

make it clear that release of the statement must be in keeping with the purposes of the Labor Laws of Virginia, as required by Va. Code §40.1-11. He noted that the impact on employees is very, very small since requests for copies of these statements are very rare for purposes of the regulation (only two or three requests in the last five years).

Making no changes to the Summary of Proposed Regulation, Basis, Purpose and Impact of the Proposed Rulemaking, Mr. Withrow recommended, on behalf of the staff of the Department of Labor and Industry, that the Board consider for adoption as a revised proposed regulation of the Board, amendments to 16 VAC 25-60, the Administrative Regulation for the VOSH Program, which include the revision of 16 VAC 25-60-240 and the addition of 16 VAC 25-60-245, to establish procedures for the Commissioner or his appointed representatives under §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

He also recommended that the Board approve an additional 30-day public comment period for the revised proposed amendments to 16 VAC 25-60, the Administrative Regulation for the VOSH Program, pursuant to Va. Code §§40.1-22(5) and 2.2-4007.03.

The motion to adopt the revised proposed amendments to 16 VAC 25-60, Administrative Regulation for the VOSH Program was properly made by Mr. Stiff, seconded by Ms. Rodriguez and unanimously carried by voice vote.

## **NEW BUSINESS**

### ***16 VAC 25-90-1910.102, Revising Standards Referenced in Acetylene Standard for General Industry, §1910.102; Direct Final Rule***

Mr. Ron Graham, Director of Occupational Health Compliance, requested, on behalf of the VOSH Program, that the Board consider for adoption federal OSHA's direct final rule for Revising Standards Referenced in the Acetylene Standard, §1910.102, as published in 74 FR 40441 on August 11, 2009.

Mr. Graham explained that this amendment to the Acetylene Standard is a continuation of federal OSHA's ongoing effort to update its standards that reference or include language from outdated standards published by standards developing organizations ("SDO standards"). He further explained that the revised standard requires that employers ensure that in-plant transfer, handling, storage and use of acetylene cylinders comply with Compressed Gas Association Pamphlet G-1-2003, Acetylene. He stated that the revisions will make the requirements of VOSH's Acetylene standard consistent with federal OSHA and with current industry practices.

He stated that in this direct final rule, federal OSHA used the SDO rulemaking project because it expects the rules to: be noncontroversial; provide protection to employees that is at least equivalent to the protection afforded to them by the outdated SDO standard; and imposes no significant new compliance costs on employers. He added that federal OSHA uses the direct final rule adoption procedure to update or, when appropriate, revoke references to outdated national consensus standards in OSHA rules.

With respect to impact, Mr. Graham informed the Board that updated SDO standards will provide employers with new and more extensive information than the current standards which should facilitate compliance. With respect to impact on employees, he stated that the revisions improve the Acetylene standard in providing safe workplaces for Virginia workers by incorporating current technology and safe industry work practices. He noted that no impact is anticipated on the Department as a result of adopting this direct final rule.

On behalf of the Department of Labor and Industry, Mr. Graham concluded by recommending that the Board adopt federal OSHA's Direct Final Rule on Revising Standards Referenced in 16 VAC 25-90-1910.102, Acetylene Standard for General Industry, §1910.102, and in 16 VAC 25-90-1910.6, Incorporation by Reference, §1910.6, as authorized by Virginia Code §§ 40.1-22(5) and 2.2-4006.A.4(c), with an effective date of April 15, 2010.

Ms. Rodriguez moved to accept Mr. Graham's recommendation. Mr. Stiff properly seconded the motion which was unanimously approved by voice vote.

***Updating OSHA Standards Based on National Consensus Standards; Personal Protective Equipment; Revised Final Rule***

Mr. Glenn Cox, Director of VOSH Programs, requested, on behalf of the VOSH Program, that the Board consider for adoption federal OSHA's revised final rule for Updating OSHA Standards Based on National Consensus Standards; Personal Protective Equipment, as published in 74 FR 46350 on September 9, 2009.

Mr. Cox explained that federal OSHA issued this final rule to revise the personal protective equipment sections of its general industry, shipyard employment, longshoring, and marine terminals standards regarding requirements for eye and face protective devices, head protection, and foot protection. He continued by stating that federal OSHA updated the references in its regulations to recognize more recent editions of the applicable national consensus standards, and deleted editions of the national consensus standards that PPE must meet if purchased before a specified date. He added that federal OSHA amended paragraph (a)(5)(v)[a] in 29 CFR 1910.94 that requires safety shoes to comply with a specific American National Standards Institute (ANSI). Additionally, he stated that federal OSHA amended paragraph (b)(2)(ii)(I) in 29 CFR 1910.252 which requires filter lenses and plates in eye-protective equipment to meet a test for transmission or radiant energy specified by another ANSI standard. He stated that these rules require that the specified PPE comply with national consensus standards incorporated by reference into the OSHA standards, unless, the employer demonstrates that a piece of equipment is "as effective as" equipment that complies with incorporated national consensus standards. He added that the employer can demonstrate this effectiveness by referencing a more current ANSI standard that may exist or be issued in the future.

He informed the Board that the rule allows employers increased flexibility in choosing PPE for employees, and will place no economic burden on employers because the regulation does not require an employer to update or replace its PPE solely as a result of this rule if the PPE currently in use meets the existing standards. He added that the final rule provides employers with additional options for meeting the designed-criteria requirement which most employers are

already using. He stated that employees will now be provided protection based on a standard that reflects state-of-the-art technology and materials. Lastly, Mr. Cox stated that the revised final rule will have no additional impact on the Department.

In closing, Mr. Cox recommended, on behalf of the Department staff, that the Board adopt the revised final rule on Updating OSHA Standards Based on National Consensus Standards; Personal Protective Equipment, as authorized by Virginia Code §§40.1-22(5) and 2.2-4006.A.4(c), with an effective date of April 15, 2010.

Mr. Stiff asked whether employers can show “as effective as” if they meet the design requirements, or have to meet design and performance, and if it is both, what would satisfy performance? Mr. Cox responded that he did not know how they could show us anything without having another ANSI standard that covered it, in that case, it would cover both. He added that he could not see how they (employers) would prove it would be “as effective as” without another consensus standard to show it.

Dr. Mundy moved to accept Mr. Cox’s recommendation. Ms. Rodriguez properly seconded the motion which was unanimously approved by voice vote.

#### ***Notice of Periodic Review***

Ms. Reba O’Connor, Regulatory Coordinator for the Department, informed the Board that no action is being requested at this time, and that approvals on periodic review reports would be requested at future Board meetings. She then explained that the basis of the regulatory review process is Executive Order Number 36 (06), “Development and Review of Regulations Proposed by State Agencies. She also explained the regulatory review process. Ms. O’Connor informed the Board of a small change that the Department was unaware of prior to mailing the Board packages. She stated that Governor Kaine signed Executive Order 107, which deals with development and review of regulations. She further explained that while this new Executive Order replaces Executive Order 36, it did not make changes in the periodic review of existing regulations.

Ms. O’Connor then informed the Board that two regulations had been identified for review in 2010: 1) 16VAC25-145, Safety Standards for Fall Protection in Steel Erection, Construction Industry; and 2) 16VAC25-155, General Requirements for Clearances, Construction of Electric Transmission and Distribution Lines and Equipment, Construction Industry – Subpart V (§1926.950(c)(1)(i)). She added that the Department staff will be reviewing these regulations over the next several months and will prepare the reports with recommendations to be presented for the Board’s consideration at the next meeting.

Mr. Sutton moved to accept Ms. O’Connor’s report. Mr. Stiff properly seconded the motion which was unanimously approved by voice vote.

#### **Items of Interest from Members from the Department of Labor and Industry**

Mr. John Crisanti, Manager of the Office of Planning and Evaluation, informed the Board about

House Bill No. 937 of the 2010 General Assembly session, which amends and reenacts §40.1-51.15 of the *Code of Virginia*, relating to fees for boiler and pressure vessel certification. The Bill requires a \$30 fee to be charged for the certificate required under subsection B of §40.1-51.10.

Next, Mr. Withrow updated the Board on two regulations that were adopted as final regulations by the Board: 16VAC25-95, Medical Services and First Aid and 16 VAC25-73, Tree Trimming. He stated that both final regulations are still in the Governor's office and will be reviewed by the new Governor, McDonnell.

He also stated that the Reverse Signal regulation has been very well received by the regulated community which he attributed to outreach efforts by the Department prior to the regulation becoming effective, such as, the creation of an entire webpage dealing with the regulation (in English and Spanish); training certification form; interpretations; FAQs; creation of pocket-sized quick cards which can also be accessed and printed from the DOLI website, including a plain language version of the regulation; enforcement directives for VOSH personnel, including Local Emphasis Program for heavy equipment, which has been updated and expanded. He also attributed the good response to the regulation to presentations made by Glenn Cox and Bill Burge before interested groups. Mr. Withrow also made a presentation about the regulation before Occupational Safety and Health State Plan Association (OSHSPA), representing all 27 states and territories that have their own state plans like Virginia. The State of Maryland has expressed interest in reviewing our regulation on Reverse Signal.

### **Items of Interest from Members from the Board**

Chair Hartsoe announced his selection of Ms. Rodriguez as Board Secretary.

### **Adjournment**

There being no further business, Mr. Hartsoe requested a motion for adjournment. Mr. Stiff made the motion to adjourn the meeting. Ms. Rodriguez seconded the motion which was carried unanimously by voice vote. The meeting adjourned at 10:53 a.m.